United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

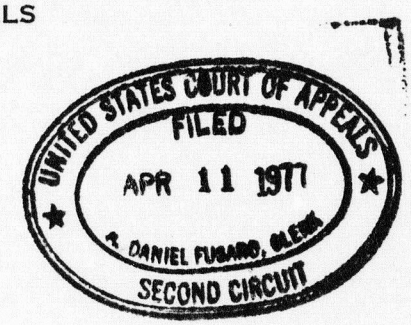
ORIG

To Be Argued By: Robert M. Beckman

77-7134, 41

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT



UNITED STATES TOUR OPERATORS ASSOCIATION, *et al.*
Plaintiffs-Appellees

— against —

TRANS WORLD AIRLINES, INC., *et al.*
Defendants-Appellants

Docket Nos. 77-7134, 41

BPLS

BRIEF FOR APPELLANTS, TRAVELLERS AIR SERVICES, INC., AND TRAVELLERS INTERNATIONAL TOUR OPERATORS, INC.

Robert M. Beckman
Beckman & Smith
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 331-1050

Marshall, Bratter, Green,
Allison & Tucker
430 Park Avenue
New York, New York 10022
(212) 421-7200

Attorneys for Travellers Air Services, Inc., and Travellers International Tour Operators, Inc.

April 8, 1977

TABLE OF CONTENTS

	Page
TABLE OF CASES AND OTHER AUTHORITIES	ii
STATEMENT OF ISSUES	1
STATEMENT OF THE CASE	2
APPLICABLE STATUTES AND REGULATIONS	5
ARGUMENT	12
I. THE DISTRICT COURT'S ORDERS ARE APPEALABLE UNDER 28 U.S.C. §1291	
II. THE COMPLAINT SHOULD BE DISMISSED	15
A. The Court and the CAB Should Not Consider the Same Case at the Same Time.	16
1. Consideration of the same issues is wasteful of judicial resources.	17
2. Defense of both proceedings denies defendants due process of law.	17
3. Contrary decisions.	18
B. The CAB Has Extensively Reviewed the TWA-TAS Program	18
C. Resolution of the Fact Issues Requires Exercise of Administrative Expertise and Discretion	21
CONCLUSION	27
APPENDIX A	

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

Cases	Page
American Airlines v. C.A.B., 365 F.2d 939 (D.C. Cir. 1966)	19
C.A.B. v. Aeromatic Travel Corp., 489 F.2d 251 (2d Cir. 1974)	12, 22, 23
Cohen v. Beneficial Ind. Loan Corp., 337 U.S. 541 (1949)	12, 13
Far East Conference v. United States, 342 U.S. 570 (1952)	19, 21, 22
Hughes Tool Company v. Trans World Airlines, 409 U.S. 363 (1973)	20
Local 771, I.A.T.S.E., AFL-CIO v. RKO General, Inc., WOR Division, No. 617 - September Term 1976, decided March 3, 1977	12, 13
Local No. 438 Construction & General Laborers' Union, AFL-CIO v. S. J. Curry, et al., 371 U.S. 542 (1963)	13
Mercantile National Bank v. Langdeau, 371 U.S. 555 (1963)	13
National Labor Relations Board v. Standard Oil Co., 138 F.2d 885 (2d Cir., 1943)	22
Pan Am., Acquisition of China National, 6 C.A.B. 143 (1944)	25
Pan Am Airways, Aerovias de Guatemala, 4 C.A.B. 403 (1943)	25

Cases	Page
Pan American World Airways v. United States, 371 U.S. 296 (1973)	24, 25
Pan American World Airways v. C.A.B., 571 F.2d 734 (2d Cir. 1975)	19
Powell v. American Export Lines, Inc., 146 F.Supp. 417 (S.D.N.Y., 1956)	17
Saturn Airways v. C.A.B., 483 F.2d 1284 (D.C. Cir., 1973)	19
Trans World Airlines v. C.A.B., 545 F.2d 771 (2d Cir., 1976)	19
United States v. Beckerman, 516 F. 2d 905 (2d Cir. 1975)	13
Weilbacher v. J. H. Winchester & Co., 197 F.2d 303 (2d Cir. 1952)	13

Statutes	
Federal Aviation Act of 1958, section 401(a), 49 U.S.C. §1371(a)	23
Federal Aviation Act of 1958, section 901(a), 49 U.S.C. §1471(a)	4
Federal Aviation Act of 1958 section 902(a), 49 U.S.C. §1472(a)	4
Federal Aviation Act of 1958 setion 1002(c), 49 U.S.C. §1482(c)	16
28 U.S.C. §1291	12, 27

Regulations

	Page
14 C.F.R. §371.3	25
14 C.F.R. §371.20	19
14 C.F.R. §371.21	20
14 C.F.R. §371.24	16
14 C.F.R. §378.3	19
14 C.F.R. §378.4	20
14 C.F.R. §378.6	16
14 C.F.R. §378.30	25

Other Authorities

1 Am Jur 2d, Abatement, Survival, and Revival, §5	17
1 Am Jur 2d, Abatement, Survival, and Revival, §6	17

STATEMENT OF THE ISSUES

1. Is the district court's denial of a motion to dismiss raising the issue of whether the CAB has primary jurisdiction a "final" order which is appealable of right pursuant to 28 U.S.C. §1291?

2. Did the district court err in holding that the CAB does not have primary jurisdiction of the issues in this case?

STATEMENT OF THE CASE

This is an appeal from the decision of the Honorable Charles E. Stewart, District Judge, denying defendants' motion to dismiss plaintiffs' claim that TWA controls Travellers Air Services, Inc. ("TAS"), an operator of charter and tour programs, and that because of such control (a) TAS should be enjoined from chartering aircraft to TAS, and (b) TAS should be enjoined from selling its charter and tour program to the public.[1/] Defendants contend that the Civil Aeronautics Board ("CAB") has primary jurisdiction. The district court held that the doctrine of primary jurisdiction did not apply.

Plaintiffs are a national association of charter/tour operators, United States Tour Operators Association, and four charter/tour operators who claim to be injured by defendants' allegedly illegal operations.[2/] In November 1976, USTOA submitted an informal complaint to the CAB's Bureau of Enforcement that TWA controlled TAS in violation of the Federal Aviation Act and the CAB's regulations.[3/] The CAB took jurisdiction of USTOA's complaint. The CAB has been actively investigating the relationship for

---

1/ Plaintiffs have also named as defendants Travellers International Tour Operators, Inc., which does not offer charters/tours in air transportation, and "Travellers International", which does not exist.

2/ The plaintiffs will be referred to herein collectively as "USTOA".

3/ Appendix A to Plaintiffs' Memorandum in Opposition to Motions to Dismiss, March 8, 1977; Attachment A to TAS' Motion to Dismiss.

five months. The CAB is conducting extensive documentary searches and interrogating witnesses.[4/] The CAB's Senior Attorney assigned to the investigation stated in an affidavit in support of the CAB's Motion to Intervene as Amicus Curiae, dated March 10, 1977:

> Since November 1976, I have been assigned to an investigation of possible violations of the Federal Aviation Act of 1958 (49 U.S.C. §1301, et seq.) and CAB Regulations (14 C.F.R. Part 200, et seq.) with respect to the TWA-Travellers Air Services, Inc. 1977 charter program. That investigation is not based solely on any complaint by plaintiffs herein and has not yet been concluded. The issues being investigated by the CAB include, but are not limited to, those contained in the complaint herein and continuation of this action would not interfere with the CAB's investigation.

On March 25, 1977, the investigation was broadened by Order C-208, Docket 30664, attached as Appendix A hereto. The Board stated:

> BOE has received certain information indicating that certain air carriers, foreign air carriers, and others may have entered into control and interlocking relationships described in sections 408 and 409 of the Act, or that other control relationships may exist, which are prohibited, or which lead to results prohibited, by the Act or Board Regulations, in violation of provisions of the Act and Board Regulations. Such actions may also constitute unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof, within the meaning of section 411 of the Act. Further, such actions, done without Board approval, would not be relieved from operation of the antitrust laws by reason of section 414 of the Act, and thus may constitute violations of those laws.

4/ CAB letter of March 1, 1977 (Attachment B to TAS Motion to Dismiss); CAB letter of March 23, 1977 (Attachment to Affidavit of H.P. Roy in support of TAS Motion for Stay in this Court.)

Notwithstanding the fact that the CAB was actively and aggressively investigating USTOA's complaint, USTOA filed a civil complaint in the southern district of New York on February 24, 1977, asking the court for the same relief it had requested from the CAB: the termination of the sale of TWA-TAS charter tour programs. USTOA has not explained why it filed its complaint in court.

USTOA sought and was granted expedited discovery by the district court.[5/] At the same time that TAS was under the direction of the district court to undertake expedited discovery involving voluminous documentary requests, interrogatories and depositions, the CAB was insisting on expedited production of even more voluminous documentary requests and interrogation of TAS' officers.[6/]

TWA and TAS filed motions to dismiss the complaint on March 2 and March 3 respectively, asserting that primary jurisdiction was in the CAB, among other grounds. After hearing oral argument on March 10, 1977, Judge Stewart denied the motions to dismiss concluding that the CAB does not have primary jurisdiction. On March 15, 1977, TWA and TAS filed motions for rehearing, reconsideration and stay pending appeal, which Judge Stewart denied by Memorandum filed March 23, 1977. Hence this appeal.[7/]

5/ Transcript, March 10, 1977, p. 29.

6/ Failure to comply with the CAB's demands exposes TAS to civil penalties of $1,000 per day, criminal penalties of $500 per day for the first offense and $2,000 per day for subsequent offenses. 49 U.S.C. §§ 1471(a) and 1472(a).

7/ On March 29, 1977, this Court granted a stay pending appeal.

APPLICABLE STATUTES AND REGULATIONS

TAS is an air carrier which provides air transportation indirectly by chartering aircraft from TWA and selling the seats to the public. Section 401(a) of the Federal Aviation Act, 49 U.S.C. §1371(a) provides:

> (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

TAS does not have a certificate because the CAB relieved TAS and other similar charter/tour operators from this requirement pursuant to the CAB's exemption power in section 416(b) (1) of the Act, 49 U.S.C. §1386(b)(1) which provides:

> (b)(1) The Board, from time to time and to the extent necessary, may (except as provided in paragraph (2) of this subsection) exempt from the requirements of this title or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest.

The exemptions for TAS' operations are contained in two regulations, 14 C.F.R. §371.20, promulgated September 1, 1976, relating to Advance Booking Charters ("ABC"), and 14 C.F.R. §378.3, promulgated September 18, 1970, relating to Inclusive Tour Charters ("ITC"). The exemption for ABC charters, 14 C.F.R. §371.20 provides:

§371.20 Exemption.

Subject to the provisions of this part and the conditions imposed herein, charter operators (other than foreign charter operators) are hereby relieved from the following provisions of Title IV of the Federal Aviation Act of 1958, as amended, to the extent necessary to permit them to organize and arrange ABC's:

Section 401.

Section 403.

Section 404(a), except the requirement to provide adequate service in connection with ABC's operated hereunder.

Section 405(b).

Section 407(b) and (c).

Sections 408(a) and 409, except control or interlocking relationships with direct air carriers.

Section 412.

The exemption for ITC charters provides:

Section 378.3 Exemption.

Subject to the provisions of this part and the conditions imposed, tour operators are hereby relieved from the following provisions of Title IV of the Federal Aviation Act of 1958, as amended, to the extent necessary to permit them to provide inclusive tours:

Section 401.

Section 403.

Section 404(a), except the requirement to provide safe and adequate service, equipment and facilities in connection with tours operated hereunder.

Section 405(b).

Section 407(b) and (c).

Section 408(a) and 409, except control or interlocking relationships with direct air carriers.

Section 412.

The Board has also granted approvals for interlocking relationships between ABC and ITC operators, on the one hand, and common carriers or persons engaged in any phase of aeronautics, on the other hand. The ABC regulation provides in 14 C.F.R. §371.21:

§371.21 Approval of certain interlocking relationships.

To the extent that any officer or director of a charter operator would be in violation of any of the provisions of Section 409(a)(3) and (6) of the Act by participating in interlocking relationships covered by the exemption granted by §371.20, such participation is hereby approved by the Board. 8/

8/ Sections 409(a) (3) and (6), 49 U.S.C. §1379(a) and (c), provide:

Sec. 409. (a) It shall be unlawful, unless such relationship shall have been approved by order of the Board upon due showing, in the form and manner prescribed by the Board, that the public interest will not be adversely affected thereby --

* * *

(3) For any person who is an officer or director of an air carrier to hold the position of officer, director, or member, or to be a stockholder holding a controlling interest, or to have a representative or nominee who represents such person as an officer, director, or member, or as a stockholder holding a controlling interest, in any other person who is a common carrier or is engaged in any phase of aeronautics.

* * *

(6) For any person who is an officer or director of an air carrier to hold the position of officer, director, or member, or to be a stockholder holding a controlling interest, or to have a representative or nominee who represents such person as an officer, director, or member, or as a stockholder holding a controlling interest, in any person whose principal business, in purpose or in fact, is the holding of stock in, or control of, any other person engaged in any phase of aeronautics.

The ITC regulation provides in 14 C.F.R. §378.4:

§378.4 Approval of certain interlocking relationships.

> To the extent that any officer or director of a tour operator would be in violation of any of the provisions of section 409(a) (3) and (6) by participating in interlocking relationships covered by the exemption granted by § 378.3, such participation is hereby approved by the Board.

The regulations each provide for waivers by the Board on its own initiative or on joint application by the direct air carrier and charter/tour operator if the waiver "is in the public interest" and if "special or unusual circumstances warrant a departure from the provisions set forth herein". 14 C.F.R. §371.3 provides:

§371.3 Waivers.

> A waiver of any of the provisions of this part may be granted by the Board upon its own initiative, or upon the joint submission by a direct air carrier and a charter operator of a written request therefor not less than 30 days prior to the flight to which it relates, provided that such a waiver is in the public interest and it appears to the Board that special or unusual circumstances warrant a departure from the provisions set forth herein. Notwithstanding the foregoing, waiver applications filed less than 30 days prior to a flight may be accepted by the Board in emergency situations in which the circumstances warranting a waiver did not exist 30 days before the flight.

14 C.F.R. §378.30 provides:

378.30 Waiver.

> A waiver of any of the provisions of this regulation may be granted by the Board upon its own initiative, or upon the submission by a direct air carrier of written request therefor, provided that such a waiver is in the public interest and it appears to the Board that special or unusual circumstances warrant a departure from the provisions set forth herein.

The regulations prescribe in detail the requirements for ABC and ITC charters. 14 C.F.R. §371.10 provides:

§371.10 Advance booking charter general requirements.

Advance booking charters under this part shall meet the following requirements:

(a) The charter shall be arranged and sold by a charter operator as an independent principal with respect to the air transportation included in the charter and not as an agent for a direct air carrier. Such charter may, but need not, include ground accommodations and services.

(b) The charter contract must be for 40 or more seats. Provided, that where an aircraft having fewer than 80 seats is utilized for not more than two ABC groups, the charter contract may be for not less than 20 seats.

(c) The charter must be on a round-trip basis, but the departing flight and the returning flight need not be performed by the same direct air carrier.

(d) The minimum duration of a European charter must be seven (7) days, of which the first day shall be the day the originating flight takes off and the last day shall be the day the returning flight lands.

(e) The air transportation portion of the charter must be performed by direct air carriers which hold a certificate of public convenience and necessity under section 401 of the Act or a permit under section 402 of the Act.

(f) Passengers transported on the charter flight shall consist solely of charter participants or persons authorized to occupy unused space in accordance with §371.13.

14 C.F.R. §378.2(b) provides:

(b) "Inclusive tour means a roundtrip tour which combines air transportation pursuant to an inclusive tour charter and land services, and which meets all of the following requirements:

(1) A minimum of seven (7) days must elapse between departure and return;

(2) The land portion of the tour must provide overnight hotel accommodations at a minimum of three places other than the point of origin, such places to be no less than 50 air miles from each other: Provided, That, in the case of an "air/sea tour," overnight accommodations provided aboard a ship, while in port or at sea, may be regarded as "hotel" accommodations; And provided further, That, for any night on which such accommodations are provided aboard a ship at sea, either the first port at which the ship stops following such night, or the last port at which the ship stops preceding such night, may be regarded as the "place" at which the overnight accommodations were provided.

(3) The tour price shall include, at a minimum, all hotel accommodations and necessary air or surface transportation between all places on the itinerary, including transportation to and from air and surface carrier terminals utilized at such places other than the point of origin;

(4) The charge to the passengers for the tour, as set forth in the tour prospectus, shall not be less than 110 percent of any available fare or fares, embodied in a tariff on file with the Board, charged by a route carrier, or combination of such carriers (including charge for stopovers) for individually ticketed service on the circle route beginning at the point of origin, to the various points where stopovers are made, and return to the point of origin: Provided, That the tour shall be subject to the terms and conditions which are applicable to such fare or fares, as set forth in the tariff of the route carrier or carriers. For purposes of this provision, (i) the term "route carrier" shall mean a certificated route air carrier or foreign route air carrier authorized under section 401 or 402 of the Federal Aviation Act of 1958, as amended, respectively, to transport persons; and (ii) the term "available fare" includes promotional or discount fares, such as family fares, children's fares, excursion fares, fares applicable to special classes of persons, group fares, etc. Where similar promotional or discount fares are offered on both jet and propeller aircraft, the available fare shall be that charged for jet services. Where no regularly scheduled service is provided between the points involved, the available fare shall be based on the fares to the nearest point served by a route carrier.

(5) An aircraft under charter to one tour operator or foreign tour operator may carry any number of tour groups,

provided that if more than one group is carried, each of the groups shall consist of 40 or more tour participants.

(6) The tour shall be arranged and sold by a tour operator acting solely as an independent principal with respect to the air transportation included in the inclusive tour charter and not as an agent for direct air carriers.

ARGUMENT

I

THE DISTRICT COURT'S ORDERS ARE APPEALABLE UNDER 28 U.S.C. §1291

The district court's orders denying defendants' motion to dismiss on the ground that the CAB has primary jurisdiction are "final" and appealable under 28 U.S.C. §1291, as interpreted by the Supreme Court in Cohen v. Beneficial Ind. Loan Corp., 337 U.S. 541, 546 (1949). The conditions of the Cohen decision are fully met.

The denial of a motion to dismiss on the ground that trial should be in another forum is wholly separate and independent of the merits of USTOA's complaint. The issue on the merits, namely whether TAS' charter/tour program violates the CAB's regulations by virtue of TWA's alleged economic and operational control, is a matter entirely apart from the determination of whether the district court or the CAB should conduct the trial of the issue.

In Local 771, I.A.T.S.E., AFL-CIO v. RKO General, Inc., WOR Division, No. 617 - September Term 1976, decided March 3, 1977, this Court held that the district court's refusal to dismiss an action was appealable because it involved the exclusivity of arbitration which "presents an issue that is separable from and collateral to the main issue in the case." The Court cited its own decision in C.A.B. v. Aeromatic Travel Corp., 489 F.2d 251 (2d Cir. 1974), for the proposition

that whether the CAB has primary jurisdiction is an issue regarding the right to trial in a different forum which is separable from and collateral to the merits for purposes of applying the Cohen rule.

This Court's Local 771 decision is one of a lengthening line of cases upholding the reviewability of orders similar to the district court's orders in the instant case. In Local 438 Construction & General Laborers' Union, AFL-CIO v. S.J. Curry, et al., 371 U.S. 542 (1963), the Supreme Court held reviewable the issue of whether the Georgia courts had the power to issue a temporary injunction. The Court said:

> Unless this judgment is reviewable now, petitioner will inevitably remain subject to the issuance of a temporary injunction at the request of the respondents and must face further proceedings in the state courts which the state courts have no power to conduct. If the permanent injunction issues, petitioner could then come here seeking the doubtful privilege of relitigating the entire matter before the National Labor Relations Board. 371 U.S. at 550.

Similarly, in Mercantile National Bank v. Langdeau, 371 U.S. 555 (1963), the Supreme Court held reviewable the determination of which state court should try the case. The Court said:

> Moreover, we believe that it serves the policy underlying the requirement of finality in 28 U.S.C. §1257 to determine now in which state court appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings. Accordingly, we note our jurisdiction to hear this appeal under § 1257(2) and turn now to the question of whether appellants may be sued in the Travis County Court. 371 U.S. at 558.

Similar decisions were reached by this court in Weilbacher v. J.H. Winchester & Co., 197 F.2d 303 (2d Cir. 1952), and United States v. Beckerman, 516 F.2d 905 (2d Cir. 1975).

The serious question of whether the CAB has primary jurisdiction of this cause distinguishes the instant case from the run-of-the-mill attempted piecemeal appeal from a denial of a motion to dismiss. As set forth in the next section of this brief, the doctrine of primary jurisdiction clearly applies since the CAB has already taken jurisdiction of the issues in this case and the CAB has already issued approvals and exemptions in connection with the subject matter of this case. The determination of the factual issues require the specialized knowledge of the CAB and, in the end, require a policy determination which only the CAB can make in light of the CAB's continuing responsibility to develop new forms of air transportation.

II

THE COMPLAINT SHOULD BE DISMISSED

This case is one involving "primary jurisdiction", but it is not like any case decided under that doctrine. The usual "primary jurisdiction" case raises the question whether an issue important to decision should be first referred to an expert administrative agency. The instant case is different because the CAB has already taken jurisdiction and is actively considering the issues at the request of USTOA. Thus, the instant case really asks whether this court should decide issues which are presently pending before the CAB rather than whether the plaintiff should be directed to submit the issues to the CAB.

There is another special feature of this case which differentiates it from the ordinary "primary jurisdiction" case. The CAB has already extensively reviewed TAS' charter tour program and granted approvals permitting it to operate:

- The CAB approved the advertising and sale of the TAS program in October 1976.

- The CAB exempted relationships between TAS and other "Travellers" companies to the extent such relationships exist and granted its approval to interlocking directorships between TAS and other common carriers or persons engaged in a phase of aeronautics.

- After five months of intensive investigation of TWA's advertising and the TWA-TAS relationship, the CAB authorized the enlargement of the TAS program to 181 flights on March 11, 1977.

• On March 28, 1977, the CAB authorized an additional TAS program on TWA chartered aircraft of one-stop inclusive tours.

The CAB's approvals of the TAS program, with full knowledge of TWA's activities, casts a different light on this case from the ordinary "primary jurisdiction" case. In effect, USTOA is asking the court to review part of the CAB's actions in a non-statutory review proceeding without the CAB being a party.

A. The Court and the CAB Should Not Consider the Same Case at the Same Time.

While this case comes to the court in the form of a request for an injunction against engaging in air transportation without a certificate of public convenience and necessity, the plaintiff is really asking the district court to decide whether there is an unlawful control relationship between TWA and TAS and whether TAS is qualified to continue to operate the charter/tour program which the CAB has thrice authorized TAS to offer and sell. The CAB is already considering these issues at plaintiff's request. The CAB has full authority and power to grant the relief requested by USTOA from the district court. 49 U.S.C. §1482(c); 14 C.F.R. §§371.24, 378.6.

USTOA elected to pursue its complaint before the CAB in November 1976. Without withdrawing its complaint to the CAB, USTOA made the instant complaint to the district court in February 1977. USTOA has not yet explained why it requested the court to decide the same issues which the CAB is actively considering at USTOA's request.

1. Consideration of the same issues is wasteful of judicial resources.

It is clearly inappropriate for the district court to expend its resources on the same matter which the CAB is intensively considering. Since the CAB has jurisdiction of USTOA's complaint and the CAB is diligently investigating USTOA's complaint, the normal deference of one adjudicatory body to another adjudicatory body with power to grant the same relief would dictate the dismissal of USTOA's second complaint before the district court.[9/] Contemporaneous consideration of the same issues by the CAB and the district court is contrary to sound judicial administration. It is wasteful of the over-taxed resources of the district court.

2. Defense of both proceedings denies defendants due process of law.

The pendency of both proceedings unfairly imposes on the defendants. The defendants are being whip-sawed. At the same time that defendants are required to respond to expedited discovery ordered by the district court at the request of USTOA, the defendants are being zealously pursued by the CAB with extensive discovery demands covering the same but also broader issues.[10/] Defendants must respond to the district court's directions. Defendants must also respond to the CAB's requests.

9/ 1 Am Jur 2d, Abatement, Survival and Revival, §§5, 6; Powell v. American Export Lines, Inc., 146 F. Supp. 417 (S.D.N.Y. 1956).

10/ See CAB letter dated March 23, 1977, attached as Exhibit A to Supplemental Affidavit of Howard P. Roy in Support of Defendants' Motion to this Court for a Stay of Proceedings Pending Appeal.

Defendants are being denied due process of law. Unless there is a compelling necessity, such injustice should not continue. There is no compelling necessity in this case. Since USTOA elected to pursue its remedies before the CAB which has taken jurisdiction, the unnecessary and vexatious court action should be dismissed.

3. Contrary decisions.

The normal and appropriate relationship of court to administrative agency is one of respect, coordination, and where necessary, correction. Research has discovered no case in the history of administrative jurisprudence where court and administrative agency contemporaneously considered the same issues at the instance of the same plaintiff against the same defendants seeking the same relief.

The doctrine of primary jurisdiction has as its aim a responsible accommodation of judicial and administrative roles. While in a particular case a court may proceed to decide an issue which could also but not necessarily must be decided by an administrative agency, there is no basis for a court to proceed to decide an issue which is already before the administrative agency. For both adjudicatory bodies to proceed contemporaneously risks contrary decisions which confuses and confounds the administration of the Federal Aviation Act. The district court action should be dismissed. USTOA can invoke judicial review after the CAB acts if USTOA is dissatisfied with the CAB's decision. Contemporaneous judicial consideration is productive of nothing but mischief.

B. The CAB Has Extensively Reviewed the TWA-TAS Program.

The essence of the doctrine of primary jurisdiction is the accommodation of "the complementary roles of courts and administrative

agencies."[11] When an issue is presented to a court which is also within the jurisdiction of an administrative agency, the court must decide which body can most productively decide the issues in the first instance.

In this case, the CAB has already made an enormous investment in the issues which the district court would be required to duplicate:

1) Firstly, the CAB is already intimately familiar with its own regulations and policies relating to advertising and promotion by direct air carriers of charter/tour programs and the relationships between direct air carriers and charter/tour operators. The meaning, purpose and intent of these regulations is uniquely known to the CAB which created the charter and tour concepts within a broad statutory mandate.[12]

2) The CAB has extensively reviewed the TWA/TAS charter/tour programs and, after requiring certain amendments, authorized the programs to be advertised and sold on October 28, 1976.[13]

3) The CAB has determined that regulating control relationships between charter/tour operators, on the one hand, and common carriers (other than direct air carriers) and persons engaged in a phase of aeronautics, on the other hand, is not required by the public interest. 14 C.F.R. §§ 371.20, 378.3. The CAB granted blanket approval

---

11/ Far East Conference v. United States, 342 U.S. 570, 575 (1952).

12/ See Trans World Airlines v. C.A.B., 545 F.2d 771 (2d Cir. 1976); Pan American World Airways v. C.A.B., 571 F.2d 734, 741 (2d Cir. 1975); Saturn Airways v. C.A.B., 483 F.2d 1284, 1287-88 (D.C. Cir. 1973); American Airlines v. C.A.B., 365 F.2d 939 (D.C. Cir. 1966).

13/ TAS Motion to Dismiss, p. 3; USTOA Memorandum in Opposition to Motions to Dismiss, App. D.

for interlocking relationships between charter/tour operators, on the one hand, and common carriers (other than direct air carriers) and persons engaged in a phase of aeronautics, on the other hand. 14 C.F.R. §§371.21, 378.4. The purpose and scope of these exemptions and approvals are uniquely known to the CAB.

4) The CAB has been actively investigating the legality of the TWA-TAS relationship since November 1976.

5) The CAB has recently reviewed and approved on March 11, 1977, an enlargement of the TWA/TAS program to 181 flights.

6) The CAB even more recently, reviewed and approved an additional program of one-stop inclusive tours on March 28, 1977.

The ordinary "primary jurisdiction" case involves an issue which is fresh to either agency or court. In this case, the CAB has an enormous investment in current, intensive review and specific knowledge of the TWA-TAS program. These special circumstances dictate the application of the doctrine of primary jurisdiction here. The district court is confronted with a gargantuan task just to come even with the CAB in learning the background of this case. The district court, despite the best efforts of the contesting parties, is unlikely to know as much as the CAB about charter/tour programs, the applicable regulations, and CAB policies. It is almost certain that the district court will not be as informed as the CAB on the meaning, effect and scope of the approvals the CAB has already granted in this case which could well be dispositive. See Hughes Tool Company v. Trans World Airlines, 409 U.S. 363 (1973).

The CAB's unique and specialized knowledge of this case dictates the applicability of the primary jurisdiction doctrine and requires dismissal of the complaint.

C. Resolution of the Fact Issues Requires Exercise of Administrative Expertise and Discretion.

The doctrine of primary jurisdiction is easily stated: "[I]n cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over." Far East Conference v. United States, 342 U.S. 570, 574 (1952). The identification of issues of facts not within the conventional experience of judges or cases requiring the exercise of administrative discretion is not so easy. Judges hear and decide complicated, difficult and even esoteric fact issues. There is no simple formula for determining the issues to which the doctrine of primary jurisdiction applies.

There are, however, certain indicia which emerge from the cases. In the Far East Conference case, supra, Justice Frankfurter pointed out that where the legality of a relationship between water carriers "may depend upon a consideration of economic relations, of facts peculiar to the business or its history, of competitive conditions in respect of the shipping of foreign countries, and other relevant circumstances, generally unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade, and with which that body, consequently, is better able to deal", the issue of violations of the

governing statute should be left, in the first instance, to the expert administrative agency. 342 U.S. at 573-74.

Judge Learned Hand, in National Labor Relations Board v. Standard Oil Co., 138 F.2d 885 (2d Cir. 1943), considered the scope of judicial review of a decision of the NLRB on the issue of whether an employer influenced the will of his employees. Recognizing that courts are not unaccustomed to deal in human motives, Judge Hand held that when the question is one of degree, i.e., "how deeply an employer's relations with his employees will overbear their will, and how long that influence will last, is, or at least may be thought to be, of another sort, to decide which a board, or tribunal chosen from those who have had long acquaintance with labor relations, may acquire a competence beyond that of any court." 138 F.2d at 887.

It would be difficult to find more thoughtful or precise definitions of the kind of fact issues which a court should leave to an agency than the quoted formulations of Justice Frankfurter and Judge Learned Hand. There are, however, two other factors which should be mentioned, although they are inapplicable here:

As this Court pointed out in C.A.B. v. Aeromatic Travel Corp., 489 F.2d 251, 254 (2d Cir. 1974), when the agency is itself the moving party in court, the doctrine of primary jurisdiction does not apply. In the instant case, the CAB is not the moving party. Rather, the CAB is independently investigating the same issue through its Bureau of Enforcement. 14/

14/ The submission of the CAB's Bureau of Enforcement that both investigations can contemporaneously continue is merely an expression of opinion. The CAB has made no determination that the TWA-TAS relationship is illegal.

The second additional factor is whether the "major issue" is one of "statutory interpretation". 489 F.2d at 254. In the instant case, there is no issue of statutory interpretation. Rather, the issues relate to the reasonableness of TWA's conduct in light of the meaning and purpose of the CAB's ABC and ITC regulations.

The claim in this case is that TWA, through its various tour, charter, marketing and advertising programs, exercises both economic and operational control over TAS. Complaint, para. 22. There is no mention of the word "control" in the applicable CAB regulations. The regulations are framed in terms of "independent principal" and "agent". It should be observed that the terms "independent principal" and "agent" do not appear in the Federal Aviation Act. That statute merely prohibits an "air carrier" from engaging in "air transportation" without a certificate unless granted an exemption by the CAB from such requirement. 49 U.S.C. §1371(a). The resolution of USTOA's claim lies in the fabric of the CAB's policy which is not yet formulated by the CAB. The decision in this case will require a policy judgment based on analyzing such matters as the following:

(1) Are TWA's tour, charter, marketing and advertising programs reasonable and appropriate at this stage of the development of ABC and ITC charters?

(2) What degree of control must exist before a separate corporate entity is no longer an "independent principal" within the meaning and purpose of the CAB's regulations?

(3) Is it contrary to the public interest for charter/tour operators to charter aircraft from direct air carriers which exercise economic and operational control through tour, charter, marketing and advertising programs?

(4) Is it consistent with the public interest to prohibit the operation of 181 flights by TWA in the coming summer of 1977 transporting over 30,000 passengers to be sold by TAS (of which more than 12,000 are already sold) or should the flights be permitted to operate subject to conditions and restrictions?

USTOA contends that the issue is simply whether "control" exists or not. USTOA asserts that "control" is a word with ordinary meaning which a court is competent to interpret. As set forth above, the issues are much more complicated than represented by USTOA. USTOA's complaint requires a determination of the reasonableness of the TWA-TAS relationship in the over-all context of the development of a new form of air transportation created by the CAB to meet a public need. Since direct air carriers, such as TWA, are legally permitted by the CAB to conduct tour, charter, marketing and advertising programs, USTOA's complaint really charges that TWA's tour, charter, marketing and advertising programs are unreasonable and are contrary to the public interest. These issues are patently for the specialized, expert CAB to determine, and not the district court.

The Supreme Court in Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1973), pointed out that "the relation of common carriers to air carriers [is] basic in this regulatory scheme." 371 U.S. at 305.

The determination of whether control exists and if so what consequences should flow from it are uniquely and exclusively for the CAB in light of its statutory mandates to encourage the development of new fields of transporation.[15] As the Supreme Court pointed out,

> But more important, the particular relation of this problem to the general process of encouraging development of new fields of air transportation makes it all the more appropriate that the Board should decide whether these particular transactions should be undone in whole or in part, or whether they should be allowed to continue. 371 U.S. at 311.

The CAB alone has the expertise and responsibility to relate the tour, charter, marketing and advertising programs of TWA to the encouragement and development of the new types of low-cost air transportation known as ABC and ITC charters. In reaching this determination, the CAB must also consider the effect on scheduled service, on foreign relations, and on policies and programs which are not yet publicly revealed.[16] The issues raised by USTOA's complaint are beyond the experience and capability of the district court. Congress clearly intended the CAB to decide the appropriate relationships between direct air carriers and charter/tour operators. Note well, that the CAB has the power not only to enforce its own regulations, but to grant waivers or to impose conditions and restrictions as may be required by the public interest.[17]

15/ The CAB has always so construed its responsibilities in determining control relationships. Pan Am. Airways, Aerovias de Guatemala, 4 C.A.B. 403, 404-05 (1943); Pan Am., Acquisition of China National, 6 C.A.B. 143, 146 (1944).

16/ See Affidavit of Robert M. Beckman in Support of Motion for Rehearing, Reargument and Stay.

17/ 14 C.F.R. §§371.3, 378.30.

Moreover, the District Court has been presented with only a small corner of the question of air carrier-charter/tour operator relationships. The CAB is evolving its policy in this area. The CAB already permits charters by foreign air carriers to controlled foreign charter/tour operators on foreign-originating charters. The CAB is considering, but has not yet announced its decision on whether to permit charters by U.S. air carriers to controlled U.S. charter/tour operators on foreign-originating charters. The CAB has held that charters by foreign air carriers to controlled charter/tour operators for U.S.-originating services is contrary to the public interest. The CAB has created a "prior approval" procedure for a foreign-charter/tour operator seeking to charter aircraft for U.S.-originating services. The CAB has permitted the sale of scheduled service seats by U. S. direct carriers to controlled tour operators for U.S.-originating tours.[18/]

If there ever was a case to which the doctrine of primary jurisdiction applies, this is it. The CAB has already exercised its jurisdiction and for over five months is actively considering the issues. The issues require consideration of economic relations, facts peculiar to the charter/tour business and its history, and competitive conditions both in the United States and in foreign countries. The CAB must also consider the relationship of the TWA-TAS question to the policies already announced and being formulated on other relationships both in

---

18/ Affidavit of Robert M. Beckman in Support of Motion for Rehearing, Reconsideration and Stay.

the United States and abroad. Plainly, it is beyond the experience and capability of the district court, presented with but a small part of the total problem, to make a determination which will result in a consistent and coherent aviation policy in terms of public interest. Only the CAB can make such a determination.

CONCLUSION

It is respectfully submitted that the District Court's order denying motions to dismiss the complaint on the ground of primary jurisdiction is appealable under 28 U.S.C. §1291. This Honorable Court is respectfully requested to set aside and reverse the order of the district court denying defendants' motion to dismiss.

Respectfully submitted,

Robert M. Beckman
Beckman & Smith
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 331-1050

Marshall, Bratter, Greene,
Allison & Tucker
430 Park Avenue
New York, New York 10022
(212) 421-7200

Attorneys for Travellers Air Services, Inc. and Travellers International Tour Operators, Inc.

April 8, 1977

CIVIL AERONAUTICS BOARD
WASHINGTON, D.C. 20428

RECEIVED
APR 7 1977
R. M. B.

IN REPLY REFER TO: B-52

April 6, 1977

Mr. Robert M. Beckman
Beckman and Smith
Suite 235
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

Dear Mr. Beckman:

Enclosed you will find a copy of Order C-208 entitled Investigation of possible violations of Sections 408 and 409 and other provisions of the Act and Board regulations by certain air carriers, foreign air carriers, or others. Please be advised that Travellers International Tour Operators, Inc., and Travellers Air Services, Inc., are, among others, the subject of an investigation being conducted at least in part pursuant to the said nonpublic investigation under 14 C.F.R. Part 305. Additionally, this investigation encompasses persons and organizations related to Travellers International Tour Operators and Travellers Air Services as is more fully described in the order itself.

Sincerely,

Thomas F. McBride
Director
Bureau of Enforcement

Enclosure

RECEIVED
APR 7 1977
R. M. B.

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

Issued under delegated authority
March 25, 1977

Investigation of possible violations of Sections 408 and 409 and other provisions of the Act and Board Regulations by certain air carriers, foreign air carriers, or others

Docket 30664

ORDER INSTITUTING NONADJUDICATORY INFORMAL NONPUBLIC INVESTIGATION PURSUANT TO PART 305 OF THE BOARD'S PROCEDURAL REGULATIONS

By this order, a nonadjudicatory informal nonpublic investigation, as defined in Part 305 of the Board's Procedural Regulations (14 C.F.R. Part 305), is being initiated by the Bureau of Enforcement (BOE), with a view to obtaining information from certain persons as to whether certain air carriers, foreign air carriers, or others have been or are violating any provisions, as detailed below, of Title IV of the Federal Aviation Act of 1958 (the Act) (49 U.S.C. Chapter 20), or any rule, regulation, order, certificate, permit, or letter of registration issued pursuant thereto by the Board.

BOE has received certain information indicating that certain air carriers, foreign air carriers, and others may have entered into control and interlocking relationships described in sections 408 and 409 of the Act, or that other control relationships may exist, which are prohibited, or which lead to results prohibited, by the Act or Board Regulations, in violation of provisions of the Act and Board Regulations. Such actions may also constitute unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof, within the meaning of section 411 of the Act.

Further, such actions, done without Board approval, would not be relieved from operation of the antitrust laws by reason of section 414 of the Act, and thus may constitute violations of those laws.

In order to obtain further evidence of the above-described possible violations of the Act, a nonadjudicatory informal nonpublic investigation, conducted in accordance with Part 305 of the Board's Procedural Regulations, is hereby instituted pursuant to the authority granted in sections 202, 204, 411, 415, 1001, 1002, and 1007 of the Act and section 305.5 of the Board's Regulations, and to the authority delegated to the Director, BOE, by section 385.22(b) of the Board's Regulations.

Paul Bessel and Mary E. Downs, staff attorneys of BOE, are designated as Investigation Attorneys for the purpose of conducting the Investigation in this docket pursuant to the provisions of Part 305. These provisions provide, in part, that witnesses may be required, by subpoenas, to appear before an Administrative Law Judge of the Board to give testimony or to produce documents or other data relating to the subject of this Investigation, or to do both. Each such witness (1) will be advised of the purpose and scope of this Investigation, (2) may, in accordance with 14 C.F.R. 305.12, file a motion to quash or modify such subpoena, (3)may be accompanied, represented, and advised by counsel, (4) will be paid fees and mileage prescribed by 14 C.F.R 302.21, and (5)will be entitled to procure, for a fee, a copy of any document produced, and testimony given, by the witness.

Part 305 investigations are attended only by the witnesses and their counsel, the Administrative Law Judge presiding, the Investigation Attorneys, other Board personnel concerned with the conduct of the proceeding, and the official stenographer. All orders concerning this Investigation, motions to quash or modify investigation subpoenas, orders disposing of the record in this Investigation, and the record of such proceeding shall constitute internal Board documents which shall not be available to the general public. 1/ The use, if any, of such records in Board proceedings subject to Part 302 of the Rules of Practice shall be governed by §§302.19(g) and 302.39 and by the law of evidence applicable to Board proceedings.

1/ In PR-165, adopted March 15, 1977, the Board amended Part 305 to provide for the public release of orders initiating investigations, such as this. However, PR-165 does not become effective until April 17, so this order will remain confidential.

Upon completion of this Investigation, if the Director, BOE, determines that no corrective action is warranted, the Investigation will be closed, and any documentary evidence obtained in the investigation will be returned to the person who produced it. If remedial action is indicated by the Investigation, the Director will proceed to Subpart B of the Board's Rules of Practice (14 C.F.R. Part 302), or will take such other action as may be appropriate.

Petitions for Board review of this Order may be filed in accordance with the procedures described below. In view of the importance of the matters described in this order, it is found that immediate action in instituting this Investigation is required, and the institution of this Investigation is governed by prior Board precedent and policy. Therefore, in accordance with 14 C.F.R. 385.6, the filing of a petition for review of this order shall not stay the effectiveness of this order, the conduct of this investigation instituted herein, or the validity of any Investigation Subpoena issued in this Investigation.

ACCORDINGLY, IT IS ORDERED THAT:

1. An nonadjudicatory, informal, nonpublic investigation pursuant to Part 305 of the Board's Procedural Regulations, is hereby initiated for the purpose of providing the Director of the Bureau of Enforcement with information concerning:

a) whether certain air carriers, foreign air carriers, or others have been and are violating provisions of the Act and Board Regulations as described herein; and

b) whether formal enforcement action, or any other appropriate course of action, should be taken with respect to such violations.

2. Paul Bessel and Mary E. Downs are designated as the Investigation Attorneys for the purpose of conducting this Investigation pursuant to the provisions of Part 305 of the Board's Procedural Regulations.

3. Any person who discloses a substantial interest which would be adversely affected by this Order, within the meaning of 14 C.F.R. 385.50, may file a Petition for Board Review of this Order. Such petitions should conform to the requirements of 14 C.F.R. 385.51, and should be filed with the Board and served on the Director, Bureau of Enforcement, within 10 days of the date of service of this Order, or within 10 days of the receipt of any subpoena issued pursuant to 14 C.F.R. 305.7(a), whichever is earlier. The proceedings on such Petitions for Review shall be governed by the provisions of Subpart C of 14 C.F.R. 385. This order shall be effective immediately, and the filing of a Petition for Review shall not stay the action described in this Order, unless the Board determines otherwise.

By Thomas F. McBride
Director
Bureau of Enforcement

PHYLLIS T. KAYLOR

Secretary

(SEAL)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES TOUR OPERATORS ASSOCIATION, ET AL. Plaintiffs-Appellees - against - TRANS WORLD AIRLINES, INC., ET AL. Defendants-Appellants	:	Docket Nos. 77-7134, 41

AFFIDAVIT OF PERSONAL SERVICE AND
SERVICE BY MAIL

Washington, D.C. ss:

Robert M. Beckman beind duly sworn, deposes and says that he is over the age of eighteen years. That on the 8th of April, 1977, at 2101 L. Street, N.W., 10th Floor, Washington, D.C. 20037, he delivered the foregoing Brief for Appellants, Travellers Air Services, Inc., and Travellers International Tour Operators, Inc. to Arthur J. Galligan, Attorney for the plaintiffs in this action, by delivering to and leaving personally with him a true copy thereof. Deponent furtner says that he knew the person served as the aforesaid to be Arthur J. Galligan.

Deponent further says that on the 8th day of April, 1977, he served the within Brief For Appellants, Travellers Air Services, Inc., and Travellers International Tour Operators, Inc. upon Harold L. Warner, Jr., attorney for defendant, Trans World Airlines, by depositing a true copy of the same securely enclosed in a post-paid wrapper in the Mail Chute maintained and exclusively controlled by the United States at 1001 Connecticut Avenue, Washington, D.C., directed to said attorney, Harold L. Warner, for the defendant at 30 Rockefeller Plaza, 24th Floor, New York, New York 10020, that being the address within the State designated by him for that purpose upon the preceding papers in this action, of the place where he then kept an office between which places there then was and now is a regular communication by mail.

Robert M. Beckman

Robert M. Beckman

Subscribed and
Sworn to before me this
8th day of April, 1977

Eva N. Bothwell

Notary Public

My Commission Expires July 31, 1978